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Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1997

UNITED MEXICAN STATES; MIGUEL ANGEL GONZALEZ, Legal Advisor of Secretary of Foreign Relations of Mexico; LUIS CABRERA, Consul General of Mexico in the State of Arizona,
Petitioners,
vs.
GRANT WOODS, Arizona Attorney General; TERRY L. STEWART, Director of the Arizona Department of Corrections; MEG SAVAGE, Warden, Arizona State Prison, Florence, Arizona,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Does the Eleventh Amendment bar a suit by a sovereign nation seeking to enjoin state officials from executing one of its nationals in violation of treaty obligations of the United States owed to that national's sovereign?

PARTIES TO THE PROCEEDINGS BELOW

All of the parties in the court of appeals are identified in the caption.

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The Government of Mexico hereby petitions for a writ of certiorari to review the decision and judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Appendix B) is reported at 126 F.3d 1220 (9th Cir.). The order of the district court, dated May 19, 1997, is attached as Appendix C.

JURISDICTION

The court of appeals entered its judgment on October 7, 1997. The court of appeals denied a timely petition for rehearing on November 21, 1997 (Appendix A). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND TREATIES INVOLVED

U.S. Constitution Amendment XI: The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The relevant provisions of the Consular Convention Between the United States of America and Mexico, the Vienna Convention on Consular Relations, and the International Convention on Civil and Political Rights are set forth in Appendix D.

STATEMENT OF THE CASE

Petitioners are the United Mexican States, the legal advisor to the Secretary of Foreign Relations for Mexico, Miguel Angel Gonzalez, and the Consul General of Mexico

in the State of Arizona, Luis Cabrera (collectively "Mexico"). Mexico invoked the jurisdiction of the United States District Court for the District of Arizona under 28 U.S.C. § 1331 seeking injunctive and declaratory relief for respondents' continuing violations of the Vienna Convention on Consular Relations, 21 U.S.T. 77, 596 U.N.T.S. 261, 4/24/63 ("Vienna Convention") and the Consular Convention Between the United States of America and Mexico, 8/12/42 ("Consular Convention") and threatened violations of the International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, 175 ("ICCPR"), Customary International Law, and 42 U.S.C. § 1983. These claims arise out of the arrest, conviction and planned execution of a Mexican national, Ramón Martínez Villareal.

A. Background

Mr. Martínez was arrested and charged with murder in 1983. Although law enforcement officials knew that Mr. Martínez was a Mexican national, they did not advise Mr. Martínez of his right to communicate with Mexican consular officials, nor did they advise the Mexican consulate of the arrest. These failures violated the Vienna and Consular Conventions.

Mr. Martínez was convicted of felony murder. His court-appointed counsel presented no mitigating evidence, much less the readily available evidence of Mr. Martínez' mental retardation and mental illness. Eventually, a federal district court (the Hon. Richard Bilby) held Mr. Martínez' death sentence unconstitutional because of ineffective assistance of counsel. That decision was reversed by the Ninth Circuit, not on the merits but because the issue was precluded because the same lawyer who performed ineffectively did not raise his own lack of effective representation as a ground for relief in the state courts.

On May 16, 1997, Mexico filed suit to enjoin the defendants' continuing violation of the Vienna and Consular Conventions and threatened violations of the ICCPR and customary international law. The ICCPR and customary international law prohibit the imposition of the death penalty if the condemned was not afforded effective assistance of counsel. Customary international law further prohibits the execution of a mentally retarded person like Mr. Martínez.

B. The Lower Courts' Decisions

Defendants immediately filed a Rule 12(b)(6) motion to dismiss Mexico's lawsuit, thus admitting as true for purposes of the motion Mexico's factual allegations about the Vienna and Consular Conventions violations, Mr. Martínez' mental retardation and the absence of effective assistance of counsel, and the resulting threatened violations of the ICCPR and customary international law. On May 19, 1997, the district court granted defendants' motion.

It did so as to the Vienna and Consular Convention claims on the ground that they were barred by the Eleventh Amendment. The court held that the *Ex Parte Young* exception for prospective relief did not apply because the violations were "past" and not continuing violations. The court dismissed the ICCPR and customary international law claims on the ground that Mexico was essentially seeking review of a state court decision, which the district court held was barred by this Court's decision in *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 103 S. Ct. 1303, 75 L. Ed. 2d 206 (1983).

On appeal, the Ninth Circuit Court of Appeals ordered expedited briefing (11 days), denied oral argument, denied Mexico the opportunity to file a reply brief, and limited the briefs to 15 pages. Six days later and without extending the

briefing schedule or page limitations, the court asked the parties to address three additional justiciability questions. Four months later, the court affirmed the district court and held that a suit seeking an injunction against a future act – Mr. Martínez' execution – was barred because Mexico was not seeking prospective relief. *United Mexican States v. Woods*, 126 F.3d 1220, 1223 (9th Cir. 1997) (Appendix B).

The Ninth Circuit did not distinguish, as the district court had, between Mexico's purely prospective ICCPR claims and the claims of ongoing violations of the Vienna and Consular Conventions.[1] Instead, it dismissed all of Mexico's claims on Eleventh Amendment sovereign immunity grounds. Relying on an analogy to a video camera, the court rejected Mexico's argument that its action comes within the *Ex Parte Young* exception for prospective relief:

> A criminal proceeding can be roughly analogized to a series of videotaped scenes: the arrest, the interrogation, the trial, the sentencing, and the appeal. Each of these scenes is examined *post hoc* in state postconviction proceedings and federal habeas. In no event, however, can the conviction or sentence be considered as a dynamic event, to be examined in a prospective fashion. The facts relating to the analysis of whether the proceedings met constitutional requirements are fixed and must be viewed through a retrospective lens.

126 F.2d at 1223.

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[1] The court also did not consider the justiciability issue that it ordered the parties to brief. 126 F.3d at 1224 n.3.

The court held that Mexico's claims for declaratory relief did not "convert the action into one for prospective relief" because:

> Mexico makes no allegations in its complaint that Arizona officials intend to ignore or violate the requirements and judgments of the state or federal courts which have jurisdiction in this case. In the absence of a valid claim of a continuing violation of law, both an injunction and a declaratory judgment are rendered unavailable.

Id. The court concluded its opinion by stating that "the Eleventh Amendment provides immunity to a state from suit by a foreign government in federal court. The *Young* exception is inapplicable because Mexico alleges no continuing violations of federal or international law." *Id.*

REASONS FOR GRANTING THE PETITION

I. The Ninth Circuit's Decision Conflicts With And Is A Major Departure From The Decisions Of This Court And Other Circuits Regarding The Scope Of The *Ex Parte Young* Exception To The Eleventh Amendment.

A. Mexico's claims are not barred because Mexico sought only prospective relief.

Without justifying nor even acknowledging it, the Ninth Circuit has crafted a brand new limitation on *Ex Parte Young* that departs from this Court's precedent. While the Eleventh Amendment bars suits against states for damages, this Court has recognized since *Ex Parte Young*, 209 U.S. 123, 128, 28 S. Ct. 441, 52 L. Ed. 714 (1908), that the

amendment permits suits against state officials whose activities deny federal rights so long as the plaintiff seeks only *prospective* relief. *Edelman v. Jordan*, 415 U.S. 651, 664-71, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974). "*Retrospective*" relief is prohibited because of monetary considerations that do not apply here.

As this Court stated in *Quern v. Jordan*, 440 U.S. 332, 337, 99 S. Ct. 1139, 39 L. Ed. 2d 358 (1979), "In *Edelman* we reaffirmed the rule that had evolved in our earlier cases that a suit in federal court by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment." The Court then explained:

> The distinction between that relief permissible under the doctrine of *Ex parte Young* and that found barred in *Edelman* was the difference between *prospective* relief on one hand and *retrospective* relief on the other.

Id. (emphasis added). Mexico does not seek retrospective relief nor money damages. It does seek *prospective* relief. Hence, the Eleventh Amendment is no bar.

The Ninth Circuit avoids this result by replacing the word "relief" with the words "review," "examination," or their equivalent. Thus, the court states,

> In no event . . . can the conviction or sentence be considered as a dynamic event, to be *examined in a prospective fashion*. The facts relating to the analysis of whether the proceedings met constitutional requirements are fixed and must be viewed through *a retrospective lens*.

126 F.3d at 1223 (emphasis added). *Cf. id.* ("The constitutional adequacy of that consideration [competency to be executed] is now another scene for *retrospective review*, based on a fixed set of facts.") (emphasis added).

The Ninth Circuit's focus on the "retrospective" nature of the background facts is superficial and seriously misconstrues this Court's *Ex Parte Young* jurisprudence. Many cases in which this Court and circuit courts have applied *Ex Parte Young* involved a "fixed set of facts" that were "viewed" "retrospectively." The Eleventh Amendment was not a bar, however, because the *relief* sought was prospective. For example, the plaintiffs in *Papasan v. Allain*, 478 U.S. 265, 106 S. Ct. 2932, 92 L. Ed. 2d 209 (1986), sued to remedy the result of the improper sale of trust lands 130 years earlier. 478 U.S. at 274. This Court held that claims seeking payment of income from the lost corpus were barred by the Eleventh Amendment, but claims that the past deprivations had created a disparity in school funding were "precisely the type of continuing violation for which a remedy may permissibly be fashioned under *Young*." *Id.* at 282.

The Ninth Circuit's decision similarly is flatly contrary to the Second Circuit's decision in *Russell v. Dunston*, 896 F.2d 664 (2d Cir.), *cert. denied*, 498 U.S. 813 (1990). There the plaintiff sued for an injunction to force the defendant state officials to reinstate plaintiff to medical leave status. The underlying facts were "fixed." The conduct complained of was in no way a "dynamic event." Judicial review would of necessity be "retrospective." Indeed, the Second Circuit acknowledged that "the relief sought in the instant case, contemplated 'chang[ing] the result of an action . . . already taken.'" *Id.* at 668. Had the Second Circuit applied the Ninth Circuit's new retrospective "review"

standard, it would have affirmed the district court's decision that plaintiff's claim was barred by the Eleventh Amendment. Instead, the court held:

> We do not agree with the district court that the existence of a past harm renders an otherwise forward-looking injunction retroactive. If it did, the rule allowing prospective relief would be substantially undermined because the need for prospective relief often arises out of a past injury.

Id. The same result should have followed here.

B. Mexico's claims satisfied the "ongoing violation" requirement.

The Ninth Circuit's assertion that the "continuing" or "ongoing" violation requirement of the Eleventh Amendment bars Mexico's claims is equally flawed and for many of the same reasons. As the Fourth Circuit explained in *Coakley v. Welch*, 877 F.2d 304, 307 n.2 (4th Cir.), *cert. denied*, 493 U.S. 976 (1989):

> [F]ew, if any, suits are barred for failure to allege an "ongoing violation" under *Papasan*. . . . Quite logically, the courts treat the issue of whether a violation is "ongoing" as related to the issues of whether prospective relief is appropriate, or whether the requested relief would operate instead as an illegitimate award of retroactive damages.

Cf. Green v. Mansour, 474 U.S. 64, 68, 106 S. Ct. 423, 88 L. Ed. 2d 371 (1985) ("Both prospective and retrospective relief implicate Eleventh Amendment concerns, but the availability

of prospective relief of the sort awarded in *Ex parte Young* gives life to the Supremacy Clause. Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law.").

As stated, Mexico does not seek money damages. To the extent that the "ongoing violation" requirement has any vitality beyond the monetary damages context it does not bar Mexico's claims. The "past violations" acknowledged by the district court are actionable ongoing violations for the same reasons that the state defendants' past conduct was actionable in *Papasan, i.e.*, there are present consequences that are the basis for Mexico's claims.

Indeed, where the past conduct has present consequences, the courts have found no Eleventh Amendment bar even where the prospective relief requires the expenditure of state funds. Thus, in *Milliken v. Bradley*, 433 U.S. 267, 97 S. Ct. 267, 53 L. Ed. 2d 745 (1977), this Court held that the Eleventh Amendment did not bar a suit to remedy the present effects of "past acts of *de jure* segregation" even though the trial court's order required the state officials to pay half of the funds needed to implement the remedial plan:

> [T]he prospective-compliance exception reaffirmed by Edelman . . . permits federal courts to enjoin state officials to conform their conduct to requirements of federal law, notwithstanding a direct and substantial impact on the state treasury.

433 U.S. at 289.

Moreover, even the district court made a distinction between Mexico's ICCPR and customary international law claims and its Vienna and Consular Convention claims. The court reasoned that the Vienna and Consular Convention violations were past violations and hence not "continuing violations," and the Ninth Circuit agreed (albeit erroneously).[2] The district court, however, did not take the same position as to the ICCPR and other claims based upon the all but conceded ineffective assistance of Mr. Martínez' counsel and Mr. Martínez' equally undisputed mental retardation.

And for good reason -- a different federal district court judge has already held that but for the ineffective assistance of Mr. Martínez' counsel, he almost certainly would not now be under a sentence of death. *Martinez-Villareal v. Lewis*, No. CIV-88-296-TUC-RMB at 20-30 (D. Ariz. Oct. 20, 1994), *reversed on procedural bar grounds*, 80 F.3d 1301, 1305 (9th Cir.), *cert. denied*, 117 S. Ct. 588 (1996). Because the ICCPR and customary international law prohibit the execution of the mentally retarded and those who have not had the assistance of competent counsel, Mexico does seek *prospective* relief to prevent *threatened* violations of those provisions. The district court did not pretend otherwise. The Ninth Circuit, however, did -- it suggested that Mexico makes no claim that Arizona officials intend to

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[2] The Fourth Circuit Court of Appeals reached the same conclusion in an opinion issued on January 22 of this year. *The Republic of Paraguay, et al. v. Allen, et al.*, No. 96-2770 (4th Cir. 1998). Interestingly, the Fourth Circuit did not in any way rely on the Ninth Circuit's analysis. Instead, the court made only one reference to the Ninth Circuit's decision, literally at the very end of its opinion and then only to note that the Ninth Circuit had similarly held that the Eleventh Amendment barred a "comparable action." The *Paraguay* case did not involve the ICCPR and other claims made here.

ignore their legal obligations.[3] But that is *precisely* Mexico's position.

In summary, the Ninth Circuit's position that Mexico does not seek prospective relief is simply untenable. Mexico seeks to enjoin an execution that would violate multiple provisions of international and treaty law. On the face of it, little is as dramatically prospective as an ordained death. To execute a person where treaty rights have been ignored is the most palpable conceivable "continuing violation."

II. The Question Presented Raises Important Issues Of State Officials' Conduct In Disregarding The Treaty Obligations Of The United States.

State officials' disregard for the treaty obligations of the United States can have far reaching consequences. Even as it rejected Paraguay's claims for violation of the Vienna Convention, the Fourth Circuit expressed its "'disenchantment'" with state officials' violation of Paraguay's treaty rights and its concern with the "disturbing implications in that conduct for larger interests of the United States and its citizens." *Paraguay*, slip op. at 11. In his special concurrence to a companion decision to *Paraguay*, Senior Judge Butzner eloquently explained why:

> The language [of the Vienna Convention] is mandatory and unequivocal, evidencing the signatories' recognition of the importance of consular access for persons detained by a foreign government.

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[3] "Mexico makes no allegations in its complaint that Arizona officials intend to ignore or violate the requirements and judgments of the state or federal courts which have jurisdiction in this case." 126 F.3d at 1223.

. . .

> The protections afforded by the Vienna Convention go far beyond Breard's case. United States citizens are scattered about the world. . . . Their freedom and safety are seriously endangered if state officials fail to honor the Vienna Convention and other nations follow their example. Public officials should bear in mind that "international law is founded upon mutuality and reciprocity. . . ."
>
> The importance of the Vienna Convention cannot be overstated. It should be honored by all nations that have signed the treaty and all states of this nation.

Breard v. Pruett, No. 96-25 (4th Cir. Jan. 22, 1998), Slip Op. at 11-12.

Perhaps the most cavalier disregard of United States' treaty obligations and the Supremacy Clause by state officials occurred last June. In a death penalty case involving another Mexican citizen, Texas state officials responded to inquiries by the United States Department of State about possible Vienna Convention violations by stating that "the State of Texas is not a signatory to the Vienna Convention on Consular Relations . . . ." *Tough Talk in Texas*, THE WASHINGTON POST, June 23, 1997, at A17.

Arizona's continuing treaty violations and the short shrift given Mexico's claims here are equally disturbing. Given the stakes involved, the serious questions of international law at issue, and the involvement of a sovereign nation, Mexico deserved at least the opportunity to brief its

claims fully and to be heard on them. If the door to the courthouse is to be closed to sovereign nations complaining of serious treaty violations, such a pronouncement should and indeed must come from this country's highest court.

CONCLUSION

The petition for a writ of certiorari should be granted.

RESPECTFULLY SUBMITTED.

February, 1998.

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED MEXICAN STATES; MIGUEL ANGEL GONZALEZ, Legal Advisor of Secretary of Foreign Relations of Mexico; LUIS CABRERA, Counsel General of Mexico in the State of Arizona,	)	No. 97-15878
	)	D.C. No. CV-97-01075
	)	**ORDER**
Plaintiffs-Appellants,	)	
vs.	)	
GRANT WOODS, Attorney General; TERRY L. STEWART, Director of the Arizona Department of Corrections; MEG SAVAGE, Warden, Arizona State Prison, Florence, Arizona,	)	
Defendants-Appellees.	)	

...

Before: D.W. NELSON, LEAVY, and T.G. NELSON, Circuit Judges

The panel has voted to deny appellants' petition for rehearing. Judge T.G. Nelson votes to reject the suggestion for rehearing en banc and Judge D.W. Nelson and Judge Leavy so recommend.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

November 21, 1997

APPENDIX B

UNITED MEXICAN STATES; MIGUEL ANGEL GONZALEZ, Legal Advisor of the Secretary of Foreign Relations of Mexico; LUIS CABRERA, Counsel General of Mexico in the State of Arizona, Plaintiffs-Appellants,

v.

GRANT WOODS, Attorney General; TERRY L. STEWART, Director of the Arizona Department of Corrections; MEG SAVAGE, Warden, Arizona State Prison, Florence, Arizona, Defendants-Appellees.

No. 97-15878.

United States Court of Appeals,
Ninth Circuit.

Submitted June 3, 1997.*

* The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a) and Ninth Circuit Rule 34-4.

OPINION. Decided October 7, 1997.

Foreign country and two of its officials brought action against state attorney general and state corrections officers, alleging that execution of citizen of foreign country violated treaties and customary international law. The United States District Court for the District of Arizona, Stephen M. McNamee, J., dismissed action, and plaintiffs appealed. The Court of Appeals, T.G. Nelson, Circuit Judge, held that: (1) defendants were immune from suit under Eleventh Amendment even though action was brought against state officials rather than state itself, and (2) action did not seek

prospective relief within meaning of *Ex Parte Young* exception to immunity.

Affirmed; request for injunction denied.

John P. Frank, Lewis and Roca, Phoenix, Arizona, for plaintiffs-appellants.

Jon G. Anderson, Assistant Attorney General, Phoenix, Arizona, for defendants-appellees.

Appeal from the United States District Court for the District of Arizona; Stephen M. McNamee, District Judge, Presiding. D.C. No. CV-97-01075.

Before: D.W. NELSON, LEAVY, and T.G. NELSON, Circuit Judges.

T.G. NELSON, Circuit Judge:

The United Mexican States and two of its officials appeal the district court's dismissal of their action against Arizona's Attorney General and two officers of the Arizona Department of Corrections. The district court held that it lacked jurisdiction under the Eleventh Amendment to the Constitution of the United States. We agree and affirm the dismissal.

BACKGROUND

Ramon Martinez-Villareal, a citizen of Mexico, was convicted of the capital murders of Jim McGrew and Fernando Estrada. His convictions and death sentences were upheld in 1985. *State v. Martinez-Villareal*, 145 Ariz. 441, 702 P.2d 670 (1985). This court denied relief on the appeal of his federal habeas petition in 1996. *Martinez-Villareal v. Lewis*, 80 F.3d

1301 (9th Cir.), *cert. denied*, --- U.S. ----, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

Martinez-Villareal's execution was scheduled for April 1997, and later postponed to May 22. On May 16, the United Mexican States, the Legal Adviser of the Secretary of Foreign Relations and the Consul General of the State of Mexico in the State of Arizona (collectively "Mexico") filed suit in district court. It contended that the execution of Martinez-Villareal would violate three treaties and customary international law. The Consul General also sought relief under 28 U.S.C. § 1983. Mexico sought a temporary restraining order and a preliminary injunction. The district court dismissed the complaint and the requests for a temporary restraining order and preliminary injunction. Mexico has appealed to this court and seeks an injunction pending appeal.

DISCUSSION

The Eleventh Amendment to the Constitution of the United States provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Although the amendment does not by its terms refer to the immunity of states from suits by foreign nations, it is now well established that the amendment does immunize the states from such suits.

Monaco v. Mississippi, 292 U.S. 313, 54 S. Ct. 745, 78 L. Ed. 1282 (1934), involved a request by the Principality of Monaco for leave to sue the State of Mississippi in the

Supreme Court upon bonds issued by Mississippi. The court noted the lack of reference in the amendment to suits by foreign nations. *Id.* at 321, 54 S. Ct. at 747. However, it held that the immunity applied to such cases, saying

> The foreign State lies outside the structure of the Union. The waiver or consent, on the part of a State, which inheres in the acceptance of the constitutional plan, runs to the other States who have likewise accepted that plan, and to the United States as the sovereign which the Constitution creates. We perceive no ground upon which it can be said that any waiver or consent by a State of the Union has run in favor of a foreign State. As to suits brought by a foreign State, we think that the States of the Union retain the same immunity that they enjoy with respect to suits by individuals whether citizens of the United States or citizens or subjects of a foreign State. The foreign State enjoys a similar sovereign immunity and without her consent may not be sued by a State of the Union.

Id. at 330, 54 S. Ct. at 751. *See also Blatchford v. Native Village of Noatak*, 501 U.S. 775, 782, 111 S. Ct. 2578, 2582, 115 L. Ed. 2d 686 (1991) ("What makes the States' surrender of immunity from suit by sister States plausible is the mutuality of that concession. There is no such mutuality with either foreign sovereigns or Indian tribes.") Thus, it is clear that Mexico may not sue the State of Arizona in federal court absent its consent, which it has not given.

Mexico argues that its suit is against state officials, not the State itself, and therefore not within the State's Eleventh Amendment immunity. This argument is untenable in the face of *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89,

104 S. Ct. 900, 79 L. Ed. 2d 67 (1984), which stated that "[t]he general rule is that relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter." *Id.* at 101, 104 S. Ct. at 908 (*quoting Hawaii v. Gordon*, 373 U.S. 57, 58, 83 S. Ct. 1052, 1053, 10 L. Ed. 2d 191 (1963)).

In this case, it is the State of Arizona which has prosecuted Martinez-Villareal and sentenced him to death. It is the State which seeks to carry out the sentence. The relief Mexico seeks would operate against the sentence imposed by the State and not against the officials designated by State law to carry out the sentence. *See id.* at 101-02, 104 S. Ct. at 908-09 ("and as when the State itself is named as the defendant, a suit against state officials that is in fact a suit against a State is barred regardless of whether it seeks damages or injunctive relief").

There is an exception to the above rule under *Ex Parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908). Under that case, if the suit involves an injunction seeking a prospective remedy for a continuing violation of federal law, a federal court may enjoin state officials from continuing such activity. *Idaho v. Coeur d'Alene Tribe of Idaho*, --- U.S. ----, ----, 117 S. Ct. 2028, 2034, 138 L. Ed. 2d 438 (1997).

The specific violations of treaty rights claimed are the failure of Arizona officials to notify Martinez-Villareal of his rights under the Vienna Convention on Consular Relations, 21 U.S.T. 77; their failure to notify Mexican Consular Officials directly of his arrest, as required by Articles I and VI of the Bilateral Consular Convention, 57 Stat. 800; their failure to provide Mexico a meaningful opportunity to assist Martinez-Villareal as required by the two treaties; their failure to ensure that Martinez-Villareal had competent counsel at all stages of the proceedings; and their intent to carry out the death sentence in spite of his mental retardation, apparently

contended to be contrary to the International Covenant on Civil and Political Rights (999 U.N.T.S. 171), as well as customary international law.

Mexico argues that its treaty-based challenges to the validity of Martinez-Villareal's conviction and sentence can give rise to prospective relief under *Ex Parte Young*. We reject this argument. A criminal proceeding can be roughly analogized to a series of videotaped scenes: the arrest, the interrogation, the trial, the sentencing, and the appeal. Each of these scenes is examined post hoc in state postconviction proceedings and federal habeas. In no event, however, can the conviction or sentence be considered as a dynamic event, to be examined in a prospective fashion. The facts relating to the analysis of whether the proceedings met constitutional requirements are fixed and must be viewed through a retrospective lens.

The same is true of Mexico's argument that Martinez-Villareal is retarded. The Constitution of the United States prohibits the execution of those who cannot understand that they are to be executed and why. *Ford v. Wainwright*, 477 U.S. 399, 106 S. Ct. 2595, 91 L. Ed. 2d 335 (1986). *See also Martinez-Villareal v. Stewart*, 118 F.3d 625 (9th Cir. 1997). The Arizona Superior Court held a four-day evidentiary hearing before concluding that Martinez-Villareal was competent to be executed. The Arizona Supreme Court considered a special action petition and denied relief. The question of Martinez-Villareal's competence to be executed has been considered as required by state law. The constitutional adequacy of that consideration is now another scene for retrospective review, based on a fixed set of facts.

Mexico has not challenged the validity of the Arizona competency determination scheme, as embodied in A.R.S. § 13-4022. Therefore, no prospective relief is involved in the determination of Martinez-Villareal's competence to be

executed. "Young has been focused on cases in which a violation of federal law by a state official is ongoing as opposed to cases in which federal law has been violated at one time or over a period of time in the past...." *Papasan v. Allain*, 478 U.S. 265, 277-78, 106 S. Ct. 2932, 2939-40, 92 L. Ed. 2d 209 (1986).

Mexico's consistent request for a "declaration" that Arizona's past conduct violated the treaties does not convert the action into one for prospective relief. Mexico is faced with the fact that it has received notice and currently has access to Martinez-Villareal. Mexico is not precluded from ensuring that Martinez-Villareal has effective counsel. Mexico makes no allegations in its complaint that Arizona officials intend to ignore or violate the requirements and judgments of the state or federal courts which have jurisdiction in this case. In the absence of a valid claim of a continuing violation of law, both an injunction and a declaratory judgment are rendered unavailable. *See Green v. Mansour*, 474 U.S. 64, 73, 106 S. Ct. 423, 428, 88 L. Ed. 2d 371 (1985) ("We think that these cases demonstrate the impropriety of the issuance of a declaratory judgment in this case. There is no claimed continuing violation of federal law, and therefore no occasion to issue an injunction.").[1]

In conclusion, the Eleventh Amendment provides immunity to a state from suit by a foreign government in federal court. The Young exception is inapplicable because Mexico alleges no continuing violations of federal or

---

[1] There is some question about the extent to which the specific language of the Covenant binds the United States, given the "reservations, understandings and declarations" involved in its ratification by the Senate in 1992. See "The International Covenant on Civil and Political Rights and the Supremacy Clause," 42 DE PAUL L.R. 1287 (1993).

international law.[2] Therefore, Arizona and its officials are immune from Mexico's suit. The district court was correct in dismissing on that basis.[3]

---

[2] Mexico also claims that the execution of Martinez-Villareal would violate customary international law because he is retarded. While the United States may not be bound to follow customary international law, *see Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 715 (9th Cir.1992), *cert. denied*, 507 U.S. 1017, 113 S. Ct. 1812, 123 L. Ed. 2d 444 (1993), the claim of mental retardation is not qualitatively different from the incompetence to be executed analysis already undertaken. Furthermore, we have examined the treaties and see no ongoing obligations which could afford prospective relief under *Young*. *Cf. Murphy v. Netherland*, 116 F.3d 97, 100 (4th Cir. 1997), *cert. denied, stay denied*, 1997 WL 562172 (U.S. 1997) (a state does not violate a constitutional right merely by violating the provisions of the Vienna Convention).

[3] The parties briefed the issue of the justiciability of this dispute, at our request. There is a question whether this kind of a dispute concerning the duties of the parties to a treaty is cognizable in federal court:

> A treaty is primarily a compact between independent Nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress, which may in the end be enforced by actual war. It is obvious that with all this, the judicial courts have nothing to do and can give no redress.

AFFIRMED. The request for injunction pending appeal is DENIED as moot.

Head Money Cases, 112 U.S. 580, 598, 5 S. Ct. 247, 253, 28 L. Ed. 798 (1884).

Since we agree with the district court that it had no jurisdiction, we need not consider the justiciability question, and express no opinion on that issue.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

UNITED MEXICAN STATES, et al.,	)	No. CIV 97-1075 PHX-SMM
Plaintiffs,	)	
vs.	)	
GRANT WOODS, Attorney General of the State of Arizona, et al.,	)	**ORDER**
Defendants.	)	

...

Plaintiffs United Mexican States, Miguel Angel Gonzalez Felix (Legal Advisor of the Secretary of Foreign Relations of Mexico), and Luis Cabrera (Consul General of Mexico in the State of Arizona) have filed an Application for Temporary Restraining Order and Preliminary Injunction, a Memorandum of Points and Authorities in Support, and a Complaint. Defendants have filed a Motion to Dismiss Complaint and Application for TRO\Preliminary Injunction pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction.[1] Plaintiffs have filed a response to the motion to

[1] Defendants' Motion to Dismiss cites Rule 12(b)(6), but alleges lack of subject matter jurisdiction. The Court will treat the motion as one based on Rule 12(b)(1).

dismiss and a reply in support of their application for TRO. Defendants also filed a reply.

The Complaint names as defendants the Attorney General of the State of Arizona, the Director of Corrections for the State of Arizona, and the Warden of the Arizona State Prison in Florence. The Complaint alleges that defendants have violated their duties to plaintiffs under the Vienna Convention on Consular Relations ("Vienna Convention"), the Consular Convention between the United Mexican States and the United States of America ("Bilateral Consular Convention"), the International Covenant on Civil and Political Rights ("ICCPR"), and customary international law. In addition, plaintiff Cabrera seeks equitable relief under 42 U.S.C. § 1983. Specifically, the Complaint alleges:

> In violation of treaty obligations and customary international law, binding on defendants as the law of the United States and owed directly to the United Mexican States and its consular officers, the defendants (1) failed to inform Mexican citizen, Ramon Martinez Villareal, during and after his arrest of his right to seek the assistance of Mexican consular officers, as required by article 36(l)(b) of the Vienna Convention, (2) failed to notify Mexican consular officers directly that a Mexican citizen had been arrested, as required by articles I and VI of the Bilateral Consular Convention, (3) failed to provide plaintiffs a meaningful opportunity to provide consular assistance to Mr. Martinez Villareal during the proceedings against him, as required by those two treaties, (4) failed to ensure that Mr. Martinez Villareal was represented by competent counsel at all stages of the proceedings; and (6) [sic] imposed and intend to carry out a sentence of death despite the fact that Mr. Martinez Villareal is mentally retarded.

Complaint at 2.

The Application for TRO\Preliminary Injunction requests the Court to issue an order restraining defendants from executing Ramon Martinez Villareal on May 21, 1997.[2]

---

[2] In 1983 Mr. Martinez Villareal was convicted of murder and sentenced to death. On March 25, 1993, in Martinez-Villareal v. Lewis, CIV 86-296-TUC-RMB, Mr. Martinez Villareal filed an Amended Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. This Court, Judge Richard M. Bilby presiding, held that Mr. Martinez Villareal was denied effective assistance of counsel at sentencing. All other claims were denied with prejudice, except for the competency-to-be-executed claim which was premature and denied without prejudice. Order dated 10/21/94. On appeal, the Ninth Circuit Court of Appeals held that the ineffective-assistance-of-counsel claim was procedurally barred and it reversed and remanded with instructions to enter judgment denying the petition. The Ninth Circuit also stated that this Court properly found the competency claim to be premature. Martinez-Villareal v. Lewis, 80 F.2d 1301 (9th Cir.), cert. denied, _ U.S. _ , 117 S. Ct. 588 (1996).

Subsequently, the Arizona Supreme Court issued a warrant of execution set for April 16, 1997, later quashed that warrant, and re-issued a warrant of execution set for May 21, 1997. Evidentiary hearings on the issue of Mr. Martinez Villareal's competency to be executed were held in state superior court on April 7 and May 6-8, 1997. On May 9, 1997, the superior court held that Mr. Martinez Villareal was competent to be executed. Arizona v. Martinez-Villareal, No. CR-97022291 (Pinal County Superior Court). On May 16, 1997, the Arizona Supreme Court denied Mr. Martinez Villareal's request for special action relief and his request for a stay of execution.

On May 13, 1997, Mr. Martinez Villareal had filed in this Court a Motion for Expert Services and Appointment of

In seeking a preliminary injunction, a plaintiff must show either (1) a likelihood of success on the merits and the possibility of irreparable injury, or (2) the existence of serious questions going to the merits and the balance of hardships tipping in plaintiff's favor. Gilder v. PGA Tour, Inc., 936 F.2d 417, 422 (9th Cir. 1991) ; Benda v. Grand Lodge of the Int'l Ass'n of Machinists & Aerospace Workers, 584 F.2d 308, 314-15 (9th Cir. 1978).

However, defendants argue that the Court lacks subject matter jurisdiction over this matter. The Court agrees.

The Eleventh Amendment to the United States Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Counsel stating that he intended to file a "supplemented petition" raising a competency-to-be-executed claim. The Court, Judge Bilby presiding, appointed counsel. The State argued that the Motion for Expert Services related to a second or successive petition and that the Court lacked jurisdiction in light of 28 U.S.C. [§] 2244(b)(3) which requires a petitioner to first obtain permission from the Circuit Court before filing a second or successive petition. This Court agreed that it lacked jurisdiction. Order dated 5/16/97, Martinez-Villareal v. Lewis, CIV 86-296-TUC-RMB.

The United Mexican States, et al., filed the present Complaint and Application for TRO\Preliminary Injunction on May 16, 1997. Although it is indirectly related to the habeas proceedings, this TRO matter remains assigned to Judge Stephen M. McNamee because Judge Bilby is presiding over a trial in Texas.

The Eleventh Amendment divests federal courts of jurisdiction over suits by a foreign country, and citizens of a foreign country, against a state. Seminole Tribe of Florida v. Florida, ___ U.S. ___ 116 S. Ct. 1114, 1129, 1136-37 (1996); Principality of Monaco v. Mississippi, 292 U.S. 313, 54 S. Ct. 745 (1934). It also bars suits against state officials that are in fact suits against a state. Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 101-2, 104 S. Ct. 900, 908-9 (1984). There is one exception to the latter bar: a party at risk of or suffering from a violation of federally protected rights may seek to enjoin the offending state officers. Ex parte Young, 209 U.S. 123, 28 S. Ct. 441 (1908). Before an injunction may issue on that basis, the plaintiff must show (1) that he seeks a remedy for a continuing violation of federal law and (2) that the relief is prospective. Green v. Mansour, 474 U.S. 64, 68, 106 S. Ct. 423, 425-26 (1986).

The United Mexican States and its officials have filed a suit against officials of the State of Arizona requesting the following relief:

> 1. Declare that the defendants violated the provisions of the Vienna Convention by failing to notify Mr. Martinez Villareal of his right to seek the assistance of Mexican consular officials.
>
> 2. Declare that the defendants violated the provisions of the Bilateral Consular Convention by virtue of their failing immediately to notify the consular officers of the United Mexican States that Mr. Martinez Villareal, a citizen of Mexico, had been arrested.
>
> 3. Declare that the defendants violated, and continue to violate, the provisions of both such treaties by having failed to afford plaintiffs a

meaningful opportunity to provide Mr. Martinez Villareal consular assistance.

4. Declare that defendants violated, and continue to violate, international common law by virtue of sentencing Mr. Martinez Villareal to death despite his mental retardation and limited mental capacity and by seeking to carry out that death sentence.

5. Declare that defendants violated, and continue to violate, the International Covenant on Civil and Political Rights and international common law by virtue of their continuing willful refusal to ensure that Mr. Martinez Villareal was afforded competent counsel at all stages of the proceedings.

6. Declare the conviction and or sentence of Mr. Martinez Villareal void.

7. Declare that any future actions taken by defendants based on the illegal conviction and sentence, including the execution of Mr. Martinez Villareal, would constitute continuing violations of the Vienna Convention, the Bilateral Consular Convention, the [ICCPR] and customary international law, and enjoin the defendants from committing any such future violations.

8. Order prospective injunctive relief requiring vacation of Mr. Martinez Villareal's conviction and sentence and mandating that the defendants, in any further proceedings involving Mr. Martinez Villareal, afford plaintiffs all rights due them under the Vienna Convention, the Bilateral Consular Convention, the [ICCPR] and customary international law.

9. Issue a temporary restraining order restraining and enjoining defendants from executing Ramon Martinez Villareal until such time as the merits of this action can be examined.

Complaint at 18-19.

Although plaintiffs have named Arizona officials as defendants, in reality this is a suit against the State of Arizona. The State of Arizona prosecuted Mr. Martinez Villareal and the State of Arizona is attempting to carry out the death sentence. The Eleventh Amendment bars this suit entirely, unless plaintiffs show that there is jurisdiction for granting injunctive relief under the Ex parte Young exception. Plaintiffs must show that they seek a remedy for a continuing violation of federal law. They have failed to make that showing. Plaintiffs have been in contact with Mr. Martinez Villareal since at least 1991. See Appendix A to Motion to Dismiss. The alleged failure of defendants in 1983 to notify him of his right to consular assistance and to notify consular officials of his arrest are past (alleged) violations of the Vienna Convention and Bilateral Consular Convention, not continuing violations. See e.g., Republic of Paraguay v. Allen, 949 F. Supp. 1269 (E.D. Va. 1996); Faulder v. Johnson, 81 F.3d 515, 520 (5th Cir. 1996).

Plaintiffs also allege that Mr. Martinez Villareal was denied effective assistance of counsel and sentenced to death "despite his mental retardation and limited mental capacity," in violation of the ICCPR and international common law.[3]

---

[3] Petitioners allege that the ICCPR was adopted by the United States on September 8, 1992. This raises a question of whether the ICCPR can be applied retroactively in that defendants' alleged failure to provide competent counsel

Plaintiffs ask the Court to declare "the illegal conviction and sentence" void. Complaint at 19. Claims of ineffective assistance of Mr. Martinez Villareal's counsel and Mr. Martinez Villareal's competency to be executed have been and continue to be the subject of extensive litigation in state court and federal habeas corpus proceedings. (See footnote 2, supra.) Except for habeas corpus review, a federal district court "has no authority to review final judgments of a state court in judicial proceedings." District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 482, 103 S. Ct. 1303, 1315 (1983). If the claims presented to the district court are "inextricably intertwined with the state court's denial in a judicial proceeding of a particular plaintiff's [claims]," then the district court "is in essence being called upon to review the state-court decision" and "[t]his the [d]istrict [c]ourt may not do." Id. at 483-84 n.16, 103 S. Ct. at 1315-16 n.16. See also Leonard v. Suthard, 927 F.2d 168, 169-70 (4th Cir. 1991). Review of state court judgments may only be had in the United States Supreme Court. Feldman, 460 U.S. at 482, 103 S. Ct. at 1315.[4] The claims presented by plaintiffs here are "inextricably intertwined" with the Arizona state courts' judgments in Mr. Martinez Villareal's direct appeal of his conviction and sentence and in his postconviction relief proceedings. This Court in these proceedings has no

---

occurred in 1983. However, the Court need not reach this question in light of its ruling on subject matter jurisdiction.

[4] "Moreover, the fact that [the United States Supreme Court] may not have jurisdiction to review a final state-court judgment because of a petitioner's failure to raise his constitutional claims in state court does not mean that a United States District Court should have jurisdiction over the claims. By failing to raise his claims in state court a plaintiff may forfeit his right to obtain review of the state-court decision in any federal court." Feldman, 460 U.S. at 483-84 n.16, 103 S. Ct. at 1315-16 n.16.

authority to declare his conviction and sentence void.[5] See e.g., Republic of Paraguay v. Allen, 949 F. Supp. at 1273.

Conclusion

This Court lacks subject matter jurisdiction in this case.

The Court realizes that plaintiffs will disagree with the Court's decision and interpretation of the law. However, the Court's dismissal of the complaint and application for TRO for lack of jurisdiction (as opposed to denying the TRO only) will allow plaintiffs to appeal to the Ninth Circuit and coordinate the appeal in this case with any motions filed by Mr. Martinez Villareal there.

Although defendants argue that plaintiffs have unnecessarily delayed filing this action, the Court can appreciate plaintiffs' reluctance to file the action except as a last resort. However, the Court also notes that the ICCPR establishes a Human Rights Committee to oversee compliance and investigate reports of noncompliance made by one party against another. See Report, Senate Committee on Foreign Relations, 102D Cong., 2D Sess., International Convention on Civil and Political Rights, Exec. Rpt. 102-23, at pp. 2-3, 6, 20 (1992). It appears that that may have been the proper forum for plaintiffs' claims.

IT IS ORDERED granting defendants' Motion to Dismiss Complaint and Application for Temporary Restraining Order and Preliminary Injunction.

---

[5] In addition, as noted in footnote 2, Mr. Martinez Villareal is currently pursuing relief in habeas corpus proceedings in federal court. To grant the relief requested in plaintiffs' complaint and application for TRO would in effect allow Mr. Martinez Villareal to avoid the restrictions on second and successive petitions in 28 U.S.C. § 2244(b).

IT IS FURTHER ORDERED that the Clerk of the Court mail and fax a copy of this Order to all counsel of record, and fax a copy to the Ninth Circuit Court of Appeals and the United States Supreme Court.

DATED this 19th day of May, 1997.

/s/
Stephen M. McNamee
United States District Judge

APPENDIX D

CONSULAR CONVENTION BETWEEN THE UNITED STATES OF AMERICA AND THE UNITED MEXICAN STATES

August 12, 1942

ARTICLE I

. . .

2.—Consular officers of each High Contracting Party shall, after entering upon their duties, enjoy reciprocally in the territories of the other High Contracting Party all the rights, privileges, exemptions and immunities which are enjoyed by consular officers of the same grade of the most favored nation, there being understood by consular officers Consuls General as well as Consuls and Vice Consuls who are not honorary. As official agents, such officers shall be entitled to the high consideration of all officials, national or local, with whom they have official intercourse in the State which receives them.

. . .

ARTICLE VI.

1.—Consular officers of either High Contracting Party may, within their respective consular districts, address the authorities, National, State, Provincial or Municipal, for the purpose of protecting the nationals of the State by which they were appointed in the enjoyment of rights accruing by treaty or otherwise. Complaint may be made for the infraction of those rights. Failure upon the part of the proper authorities to grant redress or to accord protection may justify interposition through the diplomatic channel, and in the absence of a diplomatic representative, a consul general or the consular officer stationed

at the capital may apply directly to the Government of the country.

2.—Consular officers shall, within their respective consular districts, have the right:

(a) to interview and communicate with the nationals of the State which appointed them;

(b) to inquire into any incidents which have occurred affecting the interests of the nationals of the State which appointed them;

(c) upon notification to the appropriate authority, to visit any nationals of the State which appointed them who are imprisoned or detained by authorities of the State; and

(d) to assist the nationals of the State which appointed them in proceedings before or relations with authorities of the State.

3.—Nationals of either High Contracting Party shall have the right at all times to communicate with the consular officers of their country.

VIENNA CONVENTION ON CONSULAR RELATIONS

Article 5

Consular functions

Consular functions consist in:

(a) protecting in the receiving state the interests of the sending state and of its nationals, both individuals and bodies corporate, within the limits permitted by international law;

(b) furthering the development of commercial, economic, cultural and scientific relations between the sending state and the receiving state and otherwise promoting friendly relations between them in accordance with the provisions of the present Convention;

(c) ascertaining by all lawful means conditions and developments in the commercial, economic, cultural and scientific life of the receiving state, reporting thereon to the government of the sending state and giving information to persons interested;

(d) issuing passports and travel documents to nationals of the sending state, and visas or appropriate documents to persons wishing to travel to the sending state;

(e) helping and assisting nationals, both individuals and bodies corporate, of the sending state;

(f) acting as notary and civil registrar and in capacities of a similar kind, and performing certain functions of an administrative nature, provided that there is nothing contrary thereto in the laws and regulations of the receiving state;

(g) safeguarding the interests of nationals, both individuals and bodies corporate, of the sending state in cases of succession *mortis causa* in the territory of the receiving state, in accordance with the laws and regulations of the receiving state;

(h) safeguarding, within the limits imposed by the laws and regulations of the receiving state, the interests of minors and other persons lacking full capacity who are nationals of the sending state, particularly where any guardianship or trusteeship is required with respect to such persons;

(i) subject to the practices and procedures obtaining in the receiving state, representing or arranging appropriate representation for nationals of the sending state before the tribunals and other authorities of the receiving state, for the purpose of obtaining, in accordance with the laws and regulations of the receiving state, provisional measures for the preservation of the rights and interests of these nationals, where, because of absence or any other reason, such nationals are unable at the proper time to assume the defence of their rights and interests;

(j) transmitting judicial and extra-judicial documents or executing letters rogatory or commissions to take evidence for the courts of the sending state in accordance with international agreements in force or, in the absence of such international agreements, in any other manner compatible with the laws and regulations of the receiving state;

(k) exercising rights of supervision and inspection provided for in the laws and regulations of the sending state in respect of vessels having the nationality of the sending state, and of aircraft registered in that state, and in respect of their crews;

(l) extending assistance to vessels and aircraft mentioned in subparagraph *(k)* of this article, and to their crews, taking statements regarding the voyage of a vessel, examining and stamping the ship's papers, and, without prejudice to the powers of the authorities of the receiving state, conducting investigations into any incidents which occurred during the voyage, and settling disputes of any kind between the master, the officers and the seamen in so far as this may be authorized by the laws and regulations of the sending state;

(m) performing any other functions entrusted to a consular post by the sending state which are not prohibited by the laws and regulations of the receiving state or to which no objection is taken by the receiving state or which are referred to in the international agreements in force between the sending state and the receiving state.

Article 36

Communication and contact with nationals of the sending state

1. With a view to facilitating the exercise of consular functions relating to nationals of the sending state:

. . .

(b) if he so requests, the competent authorities of the receiving state shall, without delay, inform the consular post of the sending state if, within its consular district, a national of that state is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;

. . .

INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

December 16, 1996, 999 U.N.T.S. 171

Recognizing that these rights derive from the inherent dignity of the human person,

Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights,

Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms,

Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant,

Agree upon the following articles:

. . .

Part III

Article 6

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This

penalty can only be carried out pursuant to a final judgment rendered by a competent court.

3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.

4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.

5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.

6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

. . .

Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The Press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons

otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

Supreme Court, U.S.
FILED
MAR 20 1998
CLERK

No. 97-1365

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

UNITED MEXICAN STATES, MIGUEL ANGEL GONZALEZ, Legal Advisor of Secretary of Foreign Relations of Mexico; LUIS CABRERA, Counsel General of Mexico in the State of Arizona,
PETITIONERS,

-VS-

GRANT WOODS, Arizona Attorney General; TERRY L. STEWART, Director of Arizona Department of Corrections; MEG SAVAGE, Warden, Arizona State Prison, Florence, Arizona,
RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Did the Ninth Circuit err by upholding the district court's dismissal of Petitioners' suit against three Arizona state officials for lack of subject-matter jurisdiction because the suit is barred by the Eleventh Amendment?

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OPINION BELOW

Petitioners seeks issuance of a writ of certiorari to review the Ninth Circuit's opinion in *United Mexican States v. Woods*, 126 F.3d 1220 (9th Cir. 1997).

STATEMENT OF JURISDICTION

The opinion of the United States Court of Appeals for the Ninth Circuit was issued on October 7, 1997. On October 20, 1997, Petitioners filed a petition for rehearing, with a suggestion for rehearing en banc, which was denied by the Ninth Circuit on November 21, 1997. Petitioners filed the petition for writ of certiorari on February 18, 1997, within 90 days of denial of the petition for rehearing. This Court has jurisdiction pursuant to U.S. Const. art. III, § 2; 28 U.S.C. § 1254(1); and Supreme Court Rule 10.1. The subject-matter jurisdiction of the district court was invoked under 28 U.S.C. § 1331.

PROVISIONS INVOLVED

The Eleventh Amendment of the United States Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

STATEMENT OF THE CASE

A. Martinez-Villareal's conviction and subsequent review.[1]

Ramon Martinez-Villareal was convicted of two murders and sentenced to death, based on two aggravating factors (depravity—he boasted to a traveling companion that he had killed the helpless victims merely to show how "manly" he was—and commission for pecuniary gain) that were not offset by any mitigation. The Arizona Supreme Court affirmed the convictions and sentences. *State v. Martinez-Villareal*, 702 P.2d 670, *cert. denied*, 474 U.S. 975 (1985).

Beginning in 1986, Martinez-Villareal, represented by various attorneys, litigated several federal habeas corpus petitions and two state post-conviction ("Rule 32") petitions, which resulted in stays of execution, but no substantive relief. *See Martinez-Villareal v. Arizona*, 493 U.S. 874 (1989) (denying certiorari review of second Rule 32 proceeding). In 1990, the federal district court issued another stay of execution and appointed yet another attorney (Sean Bruner) to represent Martinez-Villareal. In 1991, after Bruner suggested, for the first time, that Martinez-Villareal might be mentally incompetent to be executed, the district court ordered the pending habeas petition dismissed without prejudice, so that this issue could be litigated in the state courts.

The competency for execution claim, together with 30 other claims, was raised in a third Rule 32 petition, but the trial court summarily denied relief, ruling that all but three of the claims were precluded, and that those three raised nothing on which relief could be granted. The competency for execution claim was denied because it should not have been brought in a Rule 32 proceeding at all, but under a separate statute specifically dealing with such claims, A.R.S. §§ 13-4021 to -24. The Arizona Supreme Court denied review, and this Court denied certiorari. *Martinez-Villareal v. Arizona*, 506 U.S. 893 (1992).

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1. This procedural history has, to a large extent, been set forth by the State of Arizona in *Stewart v. Martinez-Villareal*, No. 97-300, (U.S. filed Sept. 22, 1997), *cert. granted*, 118 S. Ct. 294 (Oct. 14, 1997). This Court heard oral argument in No. 97-300 on February 25, 1998. Thus, this Court is obviously somewhat familiar with the procedural history, but it is recounted here for the Court's convenience.

Bruner then filed an amended habeas corpus petition, arguing many of the claims presented in the Rule 32 proceeding. The district court rejected most of them, but ordered that Martinez-Villareal be resentenced, on the theory that he had received ineffective representation during the original sentencing. The district court left unresolved the issue of Martinez-Villareal's competency to be executed, holding that the claim was not "ripe" for decision—there was then no warrant for his execution and the claim had not been exhausted in the state courts because no proceeding had ever been brought under the state's competency statute. On appeal, the Ninth Circuit vacated the resentencing order so that Martinez-Villareal was not granted relief of any kind. *Martinez-Villareal v. Lewis*, 80 F.3d 1301 (9th Cir.), *cert. denied*, 117 S. Ct. 588 (1996).

Left unresolved was the competency issue, which the Ninth Circuit found had been brought to the federal courts "premature[ly];" it specified that its order "to enter judgment denying the petition [was] not intended to affect any later litigation of that question." 80 F.3d at 1307 and 1309 n.1. In early 1997, the defense finally filed a motion under the state statute dealing with competency for execution and requested a hearing. The Arizona Supreme Court issued an execution warrant for April 16, 1997, but reset the execution to May 21, 1997, to allow Martinez-Villareal more time to prepare for the hearing. The trial judge concluded that Martinez-Villareal was competent to be executed. On May 16, 1997, the Arizona Supreme Court unanimously agreed that Martinez-Villareal is competent for execution and this Court denied certiorari. *Martinez-Villareal v. Arizona*, 117 S. Ct. 1840 (1997).

Whether the competency issue could be further reviewed by the federal courts in view of the 1996 Antiterrorism and Effective Death Penalty Act ("AEDPA"), was the subject of further litigation, resulting in the Ninth Circuit's staying the execution on May 19, 1997. *Martinez-Villareal v. Stewart*, 118 F.3d 625 (9th Cir. 1997). Arizona's application to this Court to vacate the stay was denied. *Stewart v. Martinez-Villareal*, 117 S. Ct. 1840 (1997). The Ninth Circuit subsequently issued an opinion holding that the new action was not a successive petition, and therefore not barred by AEDPA. *Martinez-Villareal v. Stewart*, 118 F.3d 628 (9th Cir. 1997). This Court granted certiorari review of that opinion on October 14, 1997, and heard oral argument on February 25, 1998.[2]

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2. Petitioners filed an amicus brief in that matter.

This case represented the opening of a new battlefront in the Martinez-Villareal litigation. As noted previously, Martinez-Villareal's execution was set for Wednesday, May 21, 1997. Petitioners, the United Mexican States and two Mexican officials, filed their complaint on Friday, May 16, 1997. That same day, Respondents (the Arizona Attorney General, the Director of the Department of Corrections, and the Warden of the Arizona State Prison), filed a motion to dismiss the complaint for lack of subject-matter jurisdiction.[3] The district court granted the motion and dismissed the complaint on Monday, May 19, 1997—concluding that it lacked subject-matter jurisdiction because of the Eleventh Amendment.[4] (Petitioners' Appendix at C-9). However, the Ninth Circuit stayed the execution for other reasons, as previously discussed. Petitioners' and Respondents' briefs to the Ninth Circuit addressed both the Eleventh Amendment issue and a justiciability issue (the latter issue raised by the Ninth Circuit), and the matter was submitted without oral argument, on June 3, 1997. The Ninth Circuit issued its opinion on October 7, 1997, holding that the Respondents were immune from suit under the Eleventh Amendment, and that the *Ex Parte Young* exception did not apply.[5] 126 F.3d at 1223–24.

On October 20, 1997, Petitioners filed a petition for rehearing and suggestion for rehearing on banc. The petition was denied on November 21, 1997, with no judge requesting a vote on whether to hear the matter en banc. (Petitioners' Appendix at A–2).

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3. Petitioners incorrectly assert that the motion was a Rule 12(b)(6) motion, rather than a Rule 12(b)(1) motion to dismiss for lack of subject-matter jurisdiction. (Petition at 3.) No doubt due to the time pressure of having approximately 2 hours to compose and file the motion to dismiss, Respondents' motion did include a typographical error citing Rule 12(b)(6), rather than Rule 12(b)(1). However, Respondents' reply to Petitioners' response cited Rule 12(b)(1). The federal district court, apparently recognizing the typographical error in the motion to dismiss, correctly treated the motion as one based on Rule 12(b)(1) because it alleged lack of subject-matter jurisdiction. (Petitioners' Appendix at C-1, n.1).

4. The district court also found that, except for federal habeas corpus, a federal district court has no authority to review final judgments of a state court judicial proceeding, citing *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983). (Petitioners' Appendix at C–8.) The Ninth Circuit opinion did not discuss this issue.

5. Because it disposed of the case on the Eleventh Amendment issue, the Ninth Circuit found that it was not necessary to consider the justiciability issue. 126 F.3d at 1224, n.3.

REASONS FOR DENYING THE WRIT

I

THERE IS NO CONFLICT BETWEEN THE NINTH CIRCUIT'S OPINION AND OPINIONS FROM THIS COURT OR OTHER CIRCUITS.

Petitioners argue, as their first reason for this Court to grant the petition, that the Ninth Circuit's opinion conflicts with opinions from this Court and other federal circuit courts. *See* Supreme Court Rule 10. Petitioner, however, fails to establish a conflict—there is none. First, the Fourth Circuit is the only other federal court of appeals that has considered the issue presented, and its opinion is fully in accord with the Ninth Circuit's opinion. *See Republic of Paraguay v. Allen*, 1998 WL 19933 (4th Cir. 1998) (to be reported at 134 F.3d 622). Second, there is no conflict between the Ninth Circuit's opinion and the opinions of this Court or other circuits.

A. *The Ninth Circuit and Fourth Circuit Opinions.*

Petitioners grudgingly admit, in a footnote, that the Fourth Circuit's *Paraguay* opinion, "reached the same conclusion" as the Ninth Circuit. (Petition at 10, n.2) Petitioners disingenuously attempt to downplay the strikingly parallel analyses in the Fourth and Ninth Circuit opinions by saying that the former court "did not in any way rely on the Ninth Circuit's analysis." (*Id.*) Assuming that the statement is true, the fact that the two circuits' analyses are so similar conclusively demonstrates the lack of merit in Petitioners' position. Both opinions agree that the Eleventh Amendment clearly bars a suit by a foreign government or its officials against a state (the entity obtaining a prisoner's convictions and sentences). 126 F.3d at 1222; 1998 WL 19933, at *3. Both then consider the applicability of the Eleventh Amendment exception set forth in *Ex Parte Young*, 209 U.S. 123 (1908). 126 F.3d at 1222; 1998 WL 19933, at *4. Both analyze whether the plaintiffs' requested relief is permitted prospective relief, or prohibited retrospective relief; both conclude that the relief would be retrospective. 126 F.3d at 1223; 1998 WL 19933, at *4. The Fourth Circuit states:

> But when the essence is considered, the only presently effective relief sought for the violations claimed and conceded is

> quintessentially *retrospective*: the voiding of a final state conviction and sentence.

1998 WL 19933, at *5 (emphasis added). The Ninth Circuit states:

> In no event, however, can the conviction or sentence be considered as a dynamic event, to be examined in a prospective fashion. The facts relating to the analysis of whether the proceedings met constitutional requirements are fixed and must be viewed through a *retrospective* lens.

126 F.3d at 1223 (emphasis added). Accordingly, both opinions conclude that the lawsuits do not fall within the *Ex Parte Young* exception, so the federal courts have no subject-matter jurisdiction because of the Eleventh Amendment bar. 126 F.3d at 1223–24; 1998 WL 19933, at *6. The Fourth Circuit's opinion ends by citing the Ninth Circuit's "holding to same effect in affirming dismissal on Eleventh Amendment immunity grounds of comparable action by Mexico and Mexican officials against Arizona officials." 1998 WL 1993, at *6.[6] [7]

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6. It is hardly surprising that the Fourth Circuit did not extensively discuss the Ninth Circuit opinion. In *Paraguay*, the issues were extensively briefed (including several amicus briefs), and parties presented oral arguments on June 4, 1997; *United Mexican States* was submitted, upon more limited briefing and without argument, on June 3, 1997. The Ninth Circuit opinion did not issue until October 7, 1997, so the Fourth Circuit, having already worked on its opinion for 4 months, had little reason to rely extensively on the Ninth Circuit opinion.

7. Petitioner also attempts to distinguish *Paraguay* by claiming that it "did not involve the ICCPR [International Covenant on Civil and Political Rights] and other claims made here." (Petition at 10, n.2.) That statement is partially true—*Paraguay* did not involve the ICCPR. The latter part of the statement, however, is false—both *Paraguay* and this case involved the Vienna Convention on Consular Relations. *See* 126 F.3d at 1223; 1998 WL 19933, at *2. Also, although *Paraguay* involved the "Friendship Treaty" between the United States and Paraguay, and this case involved the Consular Convention Between the United States and Mexico, both claims based their right to consular notification on the granting of that right by the United States in conventions with the United Kingdom and Union of Soviet Socialist Republics. *See* 1998 WL 19933, at *2, n.2; Complaint of United Mexican States, at 6–8). Therefore, there was, and is, a substantial overlap between the treaties involved in *Paraguay* and this case. However, Respondents submit that it simply does not matter what treaties are involved, the Eleventh Amendment bar on attacks by a foreign nation against a state criminal conviction and sentence applies, without regard to which treaties are cited.

B. *There is no conflict with opinions of this Court or of other circuit courts.*

Petitioners attempt to manufacture a conflict by citing opinions involving much different factual situations (school funding and employee reinstatements) and analyses. Under Petitioners' broad definition of a conflict, the Ninth Circuit opinion would conflict with any opinion finding the *Ex Parte Young* exception applicable. Respondents will briefly distinguish the opinions cited by Petitioners, first discussing this Court's opinions, and then discussing the alleged conflict with other circuit court opinions.

1. This Court's opinions.

Petitioner cites, as conflicting, *Papasan v. Allain*, 478 U.S. 265, 106 S. Ct. 2932 (1986), which is easily distinguishable. *See Paraguay*, 1998 WL 19933, at *5. In *Papasan*, the plaintiffs sought injunctive relief to *compel equalizing funding* of a school district that had been, and continued to be, underfunded in relation to other districts in the state as a result of the State's unconstitutional sale, 100 years earlier, of property held in trust for the district's support. Thus, *Papasan* involved a classic example of seeking injunctive relief, in the nature of *future* equalized funding, to counter presently-experienced harmful consequences of past conduct that constituted ongoing violations of federally-protected constitutional rights. In this case, by contrast, Petitioners' complaint contained seven paragraphs requesting declarative relief, while the only substantive injunctive relief requested was "requiring vacation of Mr. Martinez Villareal's conviction and sentence and mandating that the defendants,[8] in any future proceedings involving Mr. Martinez-Villareal, afford plaintiffs all rights due them . . . ." (Petitioners' Appendix at C-6). They also requested a temporary restraining order that Respondents not execute Martinez-Villareal until the

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8. As noted in the district court opinion, none of the named Respondents had been involved in obtaining the judgment against Martinez-Villareal. (Petitioners' Appendix at C-7). Nor would they be involved in a retrial or resentencing, so it is difficult to understand how the requested injunctive relief lies against the named defendants. Also it is difficult to see how Petitioners would have standing to, other than bringing the suit, request relief in the form of invalidation of the conviction. *See Whitmore v. Arkansas*, 495 U.S. 149, 163–64 (1990) (federal court has no jurisdiction to entertain a suit brought by a third party that asserts the invalidity of a state prisoner's conviction or sentence, unless the third party demonstrates that the prisoner is unable to litigate the claims himself.)

merits of their claims could be examined. (*Id.* at C-7). Thus, unlike the future funding requested in *Papasan*, Petitioners essentially wanted to go back in time and undo Martinez-Villareal's conviction and sentence. Accordingly, the Ninth Circuit's opinion does not conflict with *Papasan*.[9]

Milliken v. Bradley, 433 U.S. 267, 269 (1977) concerned a *Young* suit against various Michigan officials resulting in a federal district court order requiring the State, along with the Detroit School Board, to pay for a comprehensive education program for school children because of the State's "official acts of racial discrimination committed by both the Detroit School Board and the State of Michigan." The relief granted in that case was, once again, prospective in nature, requiring the defendants to pay, in the *future*, funds to ameliorate the effects of past conduct. *Paraguay* distinguishes *Milliken* as follows:

> As the district court put it, the state-official defendants in Milliken were "in violation of federal law at the precise moment

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9. Indeed, *Papasan* states that the *Young* exception may not be applicable if the suit would "upset the balance of federal and state interests that it embodies." 478 U.S. at 277. If the federal courts, utilizing *Papasan*, extended *Young* to attacks on state prisoners' convictions and sentences, it would completely upset the delicate interplay between state and federal interests in collateral attacks on state criminal convictions and sentences. There would be no need for 28 U.S.C. § 2254, because prisoners could just sue under § 1983 for alleged "ongoing violations" (attempted enforcement of death sentences in capital cases, imprisonment in non-capital cases) resulting from their convictions and sentences, and request as relief that the federal courts enjoin executions and vacate the convictions and sentences. However, this Court has made quite clear that § 2254 is the only method available for state prisoners to attack their convictions and sentences. *See Edwards v. Balisok*, ___ U.S. ___, 117 S. Ct. 1584, 1587 (1997) (a state prisoner's claim for damages is not cognizable under 42 U.S.C. § 1983 if a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence, unless the prisoner can demonstrate that his conviction and sentence have been previously invalidated); *Heck v. Humphrey*, 512 U.S. 477, 487, 114 S. Ct. 2364 (1994) (same); *Preiser v. Rodriguez*, 411 U.S. 475, 500 (1973) (holding that claims challenging the validity of a state prisoner's conviction and sentence are not cognizable in a § 1983 proceeding, only in a § 2254 proceeding); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482, 103 S. Ct. 1303 (1983) (holding that, except for habeas corpus review, a federal district court "has no authority to review final judgments of a state court in judicial proceedings"). Moreover, even before AEDPA, this Court made clear that § 1983 could not be utilized to avoid the § 2254 limitations on successive habeas petitions. *Lonchar v. Thomas*, ___ U.S. ___, 116 S. Ct. 1293, 1301 (1996); *Gomez v. United States District Court*, 503 U.S. 653, 653-54 (1992).

> when the case was filed." [citation omitted]. Here, by contrast, again as the district court indicated, Paraguay's claim was not, as it could not be, that Commonwealth officials were continuing to prevent Paraguay, either by action or non-action, from providing aid and counseling to Breard at the time Paraguay filed its action.

1998 WL 19933, at *5. Similarly, in this case, as the district court found, there were no present violations because "Plaintiffs have been in contact with Mr. Martinez-Villareal since at least 1991." (Petitioners' Appendix at C-7). Whe a trial court's ruling on jurisdiction is based in part on the resolution of a factual dispute, a reviewing court must accept the district court's factual findings unless they are clearly erroneous. *E.g.*, *R.M.I. Titanium v. Westinghouse Electric Corp.*, 78 F.3d 1125, 1135 (6th Cir. 1996); *Osborn v. United States*, 918 F.2d 724, 732 (8th Cir. 1990). Therefore, there was no violation of federal law by Respondents at the moment Petitioners' complaint was filed.

The Ninth Circuit's (and the Fourth Circuit's) discussion of the Eleventh Amendment and *Young* are perfectly consistent with this Court's opinions. Indeed, this Court's recent opinions have tended to limit the applicability of *Young*, not extend it. *See Idaho v. Coeur d'Alene Tribe of Idaho*, ___ U.S. ___, 117 S. Ct. 2028, 2040-43 (1997) (finding *Young* not applicable to avoid Eleventh Amendment bar to suit by tribe against Idaho for *injunctive relief* precluding state officers from exercising governmental powers and authority over disputed lands and waters); *Seminole Tribe of Florida v. Florida*, ___ U.S. ___, 116 S. Ct. 1114, 1136-37 (1996) (*Young* exception not applicable, so Eleventh Amendment bars Seminole tribe from suing for *injunctive relief* to compel the Florida Governor to negotiate a compact with the tribe under the Indian Gaming and Regulation Act). Petitioners' proposed expansion of *Young* to allow retrospective, collateral attacks on state convictions and sentences would sharply conflict with this Court's Eleventh Amendment, and habeas corpus, jurisprudence.

It is textbook constitutional law that the Eleventh Amendment precludes federal-court jurisdiction over suits by a foreign country, or a citizen of a foreign country, against a state. U.S. Const., amend. XI; *Seminole*, 116 S. Ct. at 1136-37; *Principality of Monaco v. State of Mississippi*, 292 U.S. 313, 330 (1933). As this Court said in *Monaco*:

> Controversies between a State and a foreign State may involve international questions in relation to which the United States has a sovereign prerogative. . . . The National Government, by virtue of its control of our foreign relations is entitled to employ the resources of diplomatic negotiations and to effect such an international settlement as may be found through treaty, agreement of arbitration, or otherwise. It cannot be supposed that it was the intention that a controversy growing out of the action of a State, which involves a matter of national concern and which is said to affect injuriously the interests of a foreign state . . . should be taken out of the sphere of international negotiations and adjustment through a resort by a foreign State to a suit under the provisions of section 2 of article 3. In such a case, *the State has immunity from suit without her consent*, and the National Government is protected by the provision prohibiting agreements between States and foreign powers in the absence of the consent of Congress.

292 U.S. at 311–12 (emphasis added). *Monaco* explains the underlying rationale for the Eleventh Amendment prohibition, which is that a foreign country "lies outside the structure of the Union," and cannot partake of any waiver of state sovereign immunity that "inheres in the acceptance of the constitutional plan." 292 U.S. at 310.[10]

Petitioners seek to misuse *Young* to avoid *Monaco's* strong proscription against such lawsuits. *Young* should not be used as a device to impose a basic restructuring in the relations between foreign states and American states. First, the mere fiction of naming as defendants three state officials (the Attorney General of Arizona, the Director of the Arizona Department of Corrections, and the Warden of the State Prison), does not defeat the Eleventh Amendment, otherwise "the Eleventh Amendment

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10. This Court "has never questioned this basic framework [of Eleventh Amendment immunity] set forth in Monaco v. Mississippi." *Welch v. Texas Dept. of Highways and Public Transp.*, 483 U.S. 468, 486 (1987) (plurality opinion). As recently as *Seminole*, the Court has stated, "In *Principality of Monaco v. Mississippi* [citation omitted], the Court held that the Eleventh Amendment barred a suit against a state by a foreign state." 116 S. Ct. at 1129. Indeed, in *Blatchford v. Native Village of Noatak and Circle Village*, 501 U.S. 775, 781 (1991), the Court *extended* the rationale of *Monaco* to suits by Indian tribes, stating, "Just as in Monaco with regard to foreign sovereigns, so also here with regard to Indian tribes, there is no compelling evidence that the Founders thought such a surrender [of immunity] inherent in the constitutional compact."

would have force only in the rare case in which a plaintiff foolishly attempts to sue the State in its own name." *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 101 (1984). The Eleventh Amendment bars a suit against state officials when the state is the real, substantial party in interest. *Coeur d'Alene Tribe*, 117 S. Ct. at 2034; *Pennhurst*, 465 U.S. at 101; *Quern v. Jordan*, 440 U.S. 332, 345 n.17 (1979); *Cory v. White*, 457 U.S. 85, 89, (1982). In this case, as the Ninth Circuit noted, the judgment against Martinez-Villareal was not obtained by any of the named defendants, it was obtained by the State of Arizona. 126 F.3d at 1222. As this Court said in *Pennhurst:*

> The reasoning of our recent decisions on sovereign immunity thus leads to the conclusion that a federal suit against state officials on the basis of state law contravenes the Eleventh Amendment when—as here—the relief sought and ordered has an impact directly on the State itself.

465 U.S. at 107–08. *See also Quern*, 440 U.S. at 345 n.17 (key inquiry is whether the state officer is in fact the real party in interest or whether he is only a nominal party); *Hawaii v. Gordon*, 373 U.S. 57, 58 (1963) (general rule is that relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter); *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, 51 (1944) (state cannot be controlled by suits against officials); *Worcester County Trust Co. v. Riley*, 302 U.S. 292, 296 (1937) ("[A] suit nominally against individuals, but restraining or otherwise affecting their actions as state officers, may be in substance a suit against the state, which the Constitution forbids"). Because Petitioners sought invalidation of the judgment, the action was necessarily one against the State of Arizona, and therefore barred by the Eleventh Amendment.

Petitioners are dead wrong in asserting that "'retrospective' relief is prohibited because of monetary considerations that do not apply here." (Petition at 6). The Eleventh Amendment bar applies "regardless of the nature of the relief being sought." *Pennhurst*, 465 U.S. at 119, citing *Missouri v. Fiske*, 290 U.S. 18, 27 (1933). The Ninth Circuit correctly held that *Young* applies only to *continuing violations* of federal law, requiring prospective relief. *See Green v. Monsour*, 474 U.S. 64, 73 (1985) ("We think that these cases demonstrate the impropriety of a declaratory judgment in this case. There is no claimed continuing violation

of federal law"); *Cory v. White*, 457 U.S. at 90. Petitioners claimed a past violation of international law, and requested "vacation of Mr. Martinez-Villareal's conviction and sentence," and provision of international-law rights in future proceedings; and requested issuance of "a temporary restraining order restraining and enjoining defendants from executing Ramon Martinez-Villareal until such time as the merits of this action can be examined." (Petitioners' Appendix at C-6 to -7.) Thus, there was no claim for relief for continuing violations.

Moreover, to apply *Young* to this situation would be contrary to this Court's opinion in *Seminole*. In *Seminole*, this Court found that *Young* did not aid the plaintiffs because Congress, in enacting the Indian Gaming Regulatory Act (IGRA), had created its own remedial scheme for enforcement of the Tribes' rights under the act. 116 S. Ct. at 1133. It noted that Congress, having created liability for the states that was significantly more limited than that which would otherwise apply under *Young*, must not have intended for the latter to apply. 116 S. Ct. at 1132–33. In this case, Congress has created an extensive statutory scheme, 28 U.S.C. § 2254, to regulate collateral attacks on state convictions and sentences. The fact that Congress has enacted a remedial scheme strongly indicates that it did not intend to allow foreign states to pursue collateral attacks on state convictions and sentences, pursuant to *Young*. As this Court is well aware from the briefing and argument in *Stewart v. Martinez-Villareal*, No. 97–300, Martinez-Villareal's conviction, sentence, and competency to be executed, have, and continue to be, the subject of extensive litigation in state and federal courts.

Thus, the Ninth Circuit's opinion does not conflict with this Court's opinions. Rather, it is fully in accord with this Court's opinions, as discussed above.

2. Other circuit court opinions.

The first circuit opinion upon which Petitioner relies to establish a conflict is *Russell v. Dunston*, 896 F.2d 664 (2nd Cir. 1990). In that case, the plaintiff was a New York state employee who was disabled when he was struck on the head while trying to break up a fight during the course of his employment. Eventually, the plaintiff's benefits were cut off, and the Comptroller issued a final determination denying his application for benefits. The plaintiff then filed a § 1983 action for an injunction requiring the state-official defendants to reinstate him on medical leave and to

determine his eligibility for retirement benefits on the merits. The district court dismissed, finding that the complaint sought a retroactive remedy against the state, which was barred by the Eleventh Amendment. 896 F.2d at 666–67. The Second Circuit framed the issue as whether the injunction requested "prospective" relief under *Young*. Relying on previous Second Circuit opinions, the court found that reinstatement to medical leave was prospective relief, and was not barred by the Eleventh Amendment. 896 F.2d at 668.

Considering the necessary balancing of state and federal interests that underlie the Eleventh Amendment, the differences between a plaintiff's attempt to get his own medical leave reinstated and a foreign nation's attempt to have one of its national's state criminal conviction and death sentence vacated, are so massive as to scarcely require elaboration. Suffice it to say that *Monaco*, and this Court's long-expressed concern regarding collateral attacks on state criminal convictions and sentences, make this case distinguishable from *Russell*.

Petitioners also rely on the Fourth Circuit's opinion in *Coakley v. Welch*, 877 F.2d 304 (4th Cir. 1989). However, in *Paraguay*, the Fourth Circuit distinguished its own opinions in *Coakley* and another case cited by Paraguay:

> Paraguay's reliance on *Coakley* . . ., is misplaced. Coakley held that a state employee unconstitutionally discharged from his employment suffers a "continuing violation" of that property right that could be remedied by a federal injunctive decree requiring reinstatement. . . .. Again, these cases concerned classic claims of ongoing violations of federally-protected property and liberty rights. As in Milliken and Papasan, responsible state officials were presently violating the claimants' ongoing rights.

1998 WL 19933, at *5. Once again, the named Respondents were not violating Petitioner's rights when the complaint was filed, and the only substantive relief Petitioners sought was vacation of Martinez-Villareal's conviction and sentence.

3. Conclusion to argument.

Accordingly, there is no conflict between the Ninth Circuit's ruling in this case and decisions by this Court, or other decisions by other United States Courts of Appeals. Thus, this alleged basis for certiorari review is unpersuasive.

II

THE ISSUE PRESENTED IS NOT SUFFICIENTLY IMPORTANT TO MERIT USE OF THIS COURT'S SCARCE RESOURCES.

Petitioners assert, as a second reason to grant certiorari, that this case presents an important issue of whether state officials are disregarding treaty obligations of the United States. Respondents submit that the issue presented is not sufficiently important to merit application of this Court's scarce certiorari resources.

First, one must wonder if the issue is of such widespread importance, why there are only two federal circuit court opinions on point? Assuming, *arguendo*, that the Arizona authorities in this case violated Martinez-Villareal's rights under the cited treaties, that the Virginia authorities sued in *Paraguay* violated Breard's rights, and even assuming that unnamed Texas officials, backing up their "tough talk" (Petition at 12), have violated one or more foreign national's treaty rights—such scattered incidents scarcely justify use of this Court's resources in view of the thousands of issues of more widespread importance that are constantly clamoring for this Court's consideration. Similarly, Petitioners' suggestion that other nations will go on a vendetta against American nationals because of the alleged treaty violations is pure speculation that does not merit this Court's grant of certiorari review.

Second, assuming a violation of the Vienna Convention, is the practical effect of the violation sufficient to warrant this Court's attention? As the Fourth Circuit noted in *Murphy v. Netherland*, 116 F.3d 97, 100 (4th Cir. 1997):

> Although states may have an obligation under the Supremacy Clause to comply with the provisions of the Vienna Convention, the Supremacy Clause does not convert violations of treaty

> provisions (regardless whether those provisions can be said to create individual rights) into violations of *constitutional rights*.

(emphasis in original.) The court noted that the Mexican national in that case, Murphy, had failed to establish prejudice "because he is unable to explain how contacting the Mexican consulate would have changed either his guilty plea or his sentence." *Id.* Similarly, in *Faulder v. Johnson*, 81 F.3d 515, 519 (5th Cir. 1996), the Fifth Circuit noted that Texas had admitted there was no evidence that Faulder had been advised of his rights under the Convention, but concluded, "the evidence that would have been obtained by the Canadian authorities is merely the same as or cumulative of evidence defense counsel had or could have obtained." *See also Celestine v. Butler*, 823 F.2d 74, 79–80 (5th Cir. 1987) (rejecting habeas prisoner's claims that trial and sentence violated international treaties; there was no indication that the treaties were intended to modify the legal analysis required by the United States Constitution as interpreted by the United States Supreme Court). Under the Vienna Convention, the primary purpose of requiring notice to an arrested foreign national regarding his right to contact his consulate is so that the consulate may insure that he or she is represented by counsel. See Vienna Convention at Article 5(I) and Article 36(c). Thus, the alleged violations of the Vienna Convention by Respondents, or other state officials, have little practical effect because foreign nationals are already guaranteed the appointment, and effective assistance, of counsel under the Sixth Amendment of the United States Constitution.[11]

Third, assuming, once again, that there was a technical violation of the cited treaties, the record in this case shows that the Mexican Consulate was, in fact, aware that Martinez-Villareal was being tried, and was monitoring the proceeding. Attached to Respondents' opposition to Petitioners' request for a stay by the Ninth Circuit was an affidavit from Tom McGrew, the son of one of the victims. (Appendix A.) The affidavit

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11. Petitioners harp on the fact that the federal district judge found that Martinez-Villareal received ineffective assistance at sentencing, but the Ninth Circuit found that this claim of ineffective assistance was procedurally barred, so that finding is void. Martinez-Villareal is in no different position than other state prisoners whose ineffective assistance claims are found procedurally barred because they were not fairly presented to the state courts. Martinez-Villareal is not entitled to the application of different procedural default rules merely because he is a foreign national who abused the hospitality of this country by killing an American citizen.

states that, before or during the trial, he believed that people were overlooking the fact that the second victim, Fernando Estrada-Babichi, was a Mexican national. McGrew went to the Mexican Consulate, met with a woman official there, and told her of his concerns. She said the Mexican government was concerned with the proceedings and would monitor them. Therefore, this is not a case where the foreign government was unaware that an American state was trying one of its nationals. Petitioners could easily have stepped in to assist Martinez-Villareal before, or during, trial if they had been concerned that the proceedings were unfair. Instead, they waited until just 5 days before the execution date to attack the conviction and sentence that the State of Arizona had obtained some 14 years earlier.[12]

Fourth, it is not even clear that the treaties create any rights that are enforceable in American courts to benefit Martinez-Villareal by having his conviction and sentence overturned. The Vienna Convention is not self-executing. *See Republic of Paraguay v. Allen*, 949 F. Supp. 1262, 1274 (E.D. Va. 1996), *aff'd Paraguay*, 1998 WL 19933 (4th Cir. 1997). The Convention itself indicates that all of the signatories, "Realiz[e] that the purposes of such [consular] privileges is not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective states." 21 U.S.T. at 79. The United States-Mexico Convention is plainly directed at consular officials (not private persons), and it expressly indicates (Art. VI, Sec. 1) that the remedy for a violation is "interposition through the diplomatic channel." Moreover, that Convention does not require notification to the national of his right to access, or notification to the consul of the arrest, it only establishes the right of a consul who has knowledge of such arrest to contact and assist the national. Art. VI, Sec. 2. Finally, application of the ICCPR to Martinez-Villareal is extremely problematic. Martinez-Villareal was tried, and sentenced, in 1983—the ICCPR did not even enter into force for the United States until September 8, 1992. 31 I.L.M. 645. The district court, basing its dismissal on the Eleventh Amendment, determined that it did not need to decide applicability of the treaty's provisions to Martinez-Villareal, but noted, "This raises a question of whether the ICCPR can be applied retroactively in that defendants' alleged failure to provide competent

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12. As discussed earlier, the district court found that Petitioners had been in contact with Martinez-Villareal since at least 1991. Respondents' reply (to Petitioners' response to the motion to dismiss) argued that Petitioners' suit was also barred by laches, but the district court did not consider this theory.

counsel occurred in 1983." (Petitioners' Appendix at C-7 to -8). Moreover, the Senate's reservations to the treaty clearly state that ratification of the treaty provides no more than what is provided by the Constitution: "(2) That the United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, ..." 31 I.L.M. 659. Thus, Martinez-Villareal had, under the ICCPR, no right to counsel beyond that provided by the Constitution, an issue that has been thoroughly litigated in state and federal courts over the past 15 years. Furthermore, the Senate's ratification expressly provides that the provisions of the treaty are not self-executing, which means that the treaty is not directly enforceable as United States law in United States courts. 31 I.L.M. 649, 661.

Petitioners assert that they "deserved at least the opportunity to brief its claims fully and to be heard on them." (Petition at 12-13). The issue presented has been considered by two federal district judges and by six appellate judges from the Fourth and Ninth Circuits—none of these eight federal judges has found even a glint of merit to the argument that the Eleventh Amendment does not bar such suits. Furthermore, Petitioners filed a petition for rehearing, with a suggestion for rehearing en banc, but *not one judge of the Ninth Circuit* requested a vote on whether to hear the matter en banc. This Court need not grant certiorari merely to give Petitioners the satisfaction of more fully briefing the issue, especially when the resolution of the issue is so clear.[13]

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13. Moreover, denial of certiorari does not leave Petitioners without remedies. Mexico has the political remedy of filing a protest with the United States government and seeking redress through diplomatic channels. *See United States v. Alvarez-Machain*, 504 U.S. 655, 669 (1992) (United States forcibly abducted an individual from Mexico, despite extradition treaty between United States and Mexico; Mexican government's remedy was to file a protest with the United States government); *see also Foster v. Neilson*, 27 U.S. 253, 314 (1829) ("when either of the parties [to a treaty] engages to perform a particular act, the treaty addresses itself to the political, not the judicial department"). Thus, in the first instance, the United States' response to the alleged violations of the treaties is one to be made by the executive branch of the United States government, not by Respondents in federal courts. Also, as noted by the district court, the ICCPR establishes a Human Rights Commission that oversees compliance and investigates reports of non-compliance made by one party against another. (Petitioners' Appendix at C-9). Finally, the optional protocol on dispute resolution under the Vienna Convention provides that nations can take disputes arising out of interpretations of the Convention to the International Court of Justice. See 21 U.S.T. 325, 326, 596 U.N.T.S. 487.

CONCLUSION

Based on the foregoing authorities and arguments, Respondents respectfully request this Court to deny the petition for writ of certiorari.

Respectfully submitted,

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APPENDIX A

AFFIDAVIT

STATE OF ARIZONA)
) SS
COUNTY OF SANTA CRUZ)

I, Tom McGrew, being duly sworn upon my oath, do depose as follows:

1) I am the son of James McGrew, one of two victims for which Ramon Martinez-Villareal was charged and convicted of first degree murder;

2) Before or during the trial in Santa Cruz County in April of 1983 I became concerned it was being overlooked that the other victim, Fernando Estrada-Babichi, was a Mexican National;

3) Because of this concern I went to the Mexican Consulate in Nogales, Arizona and was granted an audience with a woman official of the Consulate;

4) When I informed her of my concerns she said the Mexican Government was concerned with the proceedings and would monitor those proceedings.

Dated: May 19, 1997

s/ Tom McGrew
Tom McGrew
Tumacacori, Arizona

On this 19th day of May, 1997, Tom McGrew personally appeared before me and affixed his signature to the foregoing instrument for the purpose stated therein.

s/ Carmen C. Escobar
Notary Public

My Commission Expires:

"OFFICIAL SEAL"
Carmen C. Escobar
Notary Public Arizona
Santa Cruz County
My Commission Expires
4/16/98